SJC-13072

CARE AND PROTECTION OF RASHIDA.[1]

Norfolk. December 8, 2021. - February 7, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Department of Children & Families. Minor, Custody, Temporary custody. Parent and Child, Custody of minor.

Petition filed in the Norfolk County Division of the Juvenile Court Department on February 3, 2020.

Following review by this court, 488 Mass. 217 (2021), the parties filed a joint motion for clarification.

Ann Balmelli O'Connor, Committee for Public Counsel Services, for the mother.

William A. Comeau for the child.

Jeremy Bayless for Department of Children and Families.

Jonathan M. Albano, Michael C. Polovich, & Emma Coffey, for Lawyers for Civil Rights, amicus curiae, submitted a brief.

Jessica Berry & Thomas J. Carey, Jr., for Jessica Berry & others, amici curiae, submitted a brief.

[1] A pseudonym.

KAFKER, J. We are presented here with a sequel to our decision in Care & Protection of Rashida, 488 Mass. 217 (2021) (Rashida I). There, we addressed several issues concerning the requirement under G. L. c. 119, § 29C, that, when a child has previously been removed from his or her home and committed to the custody of the Department of Children and Families (department), a Juvenile Court judge must determine "not less than annually" whether the department has made ongoing "reasonable efforts to make it possible for the child to return safely to his [or her] parent or guardian."

We interpreted this provision to give the Juvenile Court discretion to make reasonable efforts determinations more than once a year. Rashida I, 485 Mass. at 226, 230. Accordingly, we recognized that a party may file a motion seeking a reasonable efforts determination outside of the required annual review, which the motion judge has discretion to grant if the moving party has met its burden of production. Id. at 230-232. If the motion is granted, the burden then shifts to the department to prove that it has made reasonable efforts to reunify the child with his or her family. Id. at 234. We did not, however, specify the standard by which the department would have to prove that it has made reasonable efforts.

The parties in Rashida I -- the department, the child, and the child's mother -- thereafter jointly petitioned for

clarification of this standard. Originally, all parties proposed a fair preponderance of the evidence standard. The court thereafter requested additional briefing on the issue, as the original briefing on the question was minimal. In its subsequent filing, the department continues to argue that the standard of proof should be fair preponderance of the evidence. The child and the mother now argue for the more demanding clear and convincing evidence standard. After consideration of the additional briefing, we conclude that the appropriate standard is proof by a fair preponderance of the evidence.

Discussion. 1. The statutory scheme. Although the parties have asked this court to clarify the standard of proof that applies at a reasonable efforts hearing conducted on a parent's or child's motion, the statute requires reasonable efforts determinations at numerous stages in a care and protection case. "[I]n the absence of a plain contrary indication, a word used in one part of a statute in a definite sense should be given the same meaning in another part of the same statute" (citation omitted). Care & Protection of Robert, 408 Mass. 52, 64 (1990) (Robert). Accordingly, we hold that absent a clear statutory indication to the contrary, the same standard of proof applies at every stage in a care and protection case where a reasonable efforts determination is required or permitted by statute. We therefore begin by briefly

reviewing the statutory scheme governing care and protection proceedings and the place of reasonable efforts determinations within that scheme.

As we explained in Rashida I, 488 Mass. at 219-220, quoting G. L. c. 119, § 29C, "[a] judge is required by statute to determine whether the department has made reasonable efforts at the emergency hearing, the seventy-two hour hearing, and 'not less than annually' thereafter." At both the emergency hearing and the seventy-two hour hearing, the judge is required to determine that the department "has made reasonable efforts prior to the placement of a child with the department to prevent or eliminate the need for removal from the home." Rashida I, supra at 220, quoting G. L. c. 119, § 29C. See Care & Protection of Walt, 478 Mass. 212, 213 (2017) (Walt). "The department's obligation to make reasonable efforts does not end once the department takes temporary custody of a child," although the "purpose of those efforts shifts" toward "making it 'possible for the child to return safely to his parent or guardian.'" Walt, supra at 221, quoting G. L. c. 119, § 29C. See Rashida I, supra. Accordingly, "[s]o long as the child remains in the care of the department," the Juvenile Court "must hold an annual permanency hearing," where the judge will, inter alia, determine whether the department has made reasonable efforts toward reuniting the child with his or her family. Rashida I, supra,

citing Rule 8 of the Uniform Rules for Permanency Hearings, Trial Court Rule VI. The minimum annual reasonable efforts determination required by G. L. c. 119, § 29C, usually coincides with the annual permanency hearing. Rashida I, supra.

In addition to holding a permanency hearing every year that a child is in the department's care, "within twelve to fifteen months" of the filing of the care and protection petition, the Juvenile Court will adjudicate that petition on the merits, determining whether the child is in need of care and protection. Id. At this merits hearing, the court must again make a reasonable efforts determination. Id. In Rashida I, we also clarified that a party may move for a reasonable efforts determination at other times than at the permanency and merits hearings. See id. at 230.

Despite the numerous occurrences of reasonable efforts determinations within the life of a care and protection case, there is no statutory specification of the applicable standard of proof at any of these different stages. This court has likewise not expressly articulated the standard by which the department must demonstrate that it has made reasonable efforts.

2. The original briefing on the issue of the standard of proof. In its brief in Rashida I, the department argued that in reasonable efforts determinations, it should be required to prove its reasonable efforts by a preponderance of the evidence,

because reasonable efforts determinations are properly characterized as subsidiary findings of fact. The department's argument drew on the distinction set out in our case law between the ultimate determination in a care and protection proceeding to terminate parental rights, which must be established by clear and convincing evidence, and subsidiary facts, which must be proved by a preponderance of evidence. The mother's original brief adopted the same approach.

We have indeed held that in any proceeding to commit a child permanently to the custody of the department, "the department bears the burden of proving, by clear and convincing evidence, that a parent is currently unfit to further the best interests of a child and, therefore, the child is in need of care and protection." Care & Protection of Erin, 443 Mass. 567, 570 (2005), citing Care & Protection of Stephen, 401 Mass. 144, 150-151 (1987). In contrast, where a judge makes findings regarding "subsidiary facts," which inform the judge's decision on "the ultimate question of parental unfitness," those subsidiary factual findings "need only be supported by a preponderance of the evidence." Care & Protection of Laura, 414 Mass. 788, 794 (1993), citing Custody of Two Minors, 396 Mass. 610, 619 (1986). See Adoption of Quentin, 424 Mass. 882, 886 (1997) (in proceedings to dispense with parental consent to

adoption, "subsidiary findings must be proved by a fair preponderance of the evidence").

We requested supplemental briefing because, in our view, reasonable efforts determinations do not fall neatly into either of the two well-defined categories with established burdens of proof. Although a reasonable efforts determination is a subsidiary aspect of the over-all adjudication of a care and protection or termination proceeding, it is not just a specific factual determination. A judge who makes a reasonable efforts determination is not tasked only with establishing the historical facts regarding the services that the department has offered to the parents of a child in its care. The judge must also interpret the "reasonable efforts" standard set out in G. L. c. 119, § 29C, and determine whether the services offered by the department satisfy that statutory standard. Whether the department has made reasonable efforts is therefore a mixed question of law and fact. See Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982) (characterizing as mixed questions of law and fact issues concerning whether facts found satisfy given statutory standard). Because reasonable efforts determinations neither are properly categorized as subsidiary factual findings, nor do they control the ultimate inquiry into parental unfitness, further analysis is required to determine the appropriate standard of proof.

3. Discerning burden of proof requirements in the absence of express statutory direction. For guidance on how to discern the burden of proof in care and protection proceedings in the absence of express statutory direction, we turn to our decision in Robert, 408 Mass. 52, which addressed the standard of proof required to maintain the department's temporary custody over a child at the seventy-two hour hearing. The parent in that case, as in this one, contended that clear and convincing evidence was required. The court concluded otherwise, employing an approach that we adopt here as well.

In Robert, 408 Mass. at 57, the court began "with an examination of the language of G. L. c. 119, § 24, to determine which standard of proof, if any, the Legislature intended to be applied to a seventy-two hour hearing." Observing that "[n]either [the statute] nor our previous decisions shed any light on the standard of proof which is to be applied to the seventy-two hour hearing," the court held that "where no standard of proof is provided for a proceeding which is required by statute, due process demands application of a standard appropriate to the 'particular situation' which is presented." Id. at 58, quoting Andrews, petitioner, 368 Mass. 468, 486 (1975).

The court further clarified that in determining what standard of proof due process requires in a particular context,

courts are to apply the test articulated by the United States Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (Eldridge), which requires consideration of (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

As previously explained, in the instant case, as in Robert, the statute does not expressly provide for a particular standard of proof. Unlike in Robert, 408 Mass. at 58, however, where there was no case law that "shed any light on the standard of proof which is to be applied," here our decision in Robert itself provides substantial guidance. There, we decided that preponderance of evidence, not clear and convincing evidence, is the standard of proof applicable at the seventy-two hour hearing, on the ground that this standard is appropriate to meet the constitutional requirements of procedural due process. Id. at 68. We are guided by the reasoning of the Robert court, including its application of the Eldridge balancing test, in discerning what standard of proof applies in reasonable efforts determinations in the absence of express statutory instructions.

The most significant difference between this case and Robert is that the private interests at stake in a reasonable efforts determination are less substantial than those at stake in a seventy-two hour hearing. The latter involves a decision that may deprive parents of custody, even if only temporarily, and therefore implicates an interest that "has been deemed fundamental, and is constitutionally protected." Robert, 408 Mass. at 60, quoting Department of Pub. Welfare v. J.K.B., 379 Mass. 1, 3 (1979). See Santosky v. Kramer, 455 U.S. 745, 753 (1982) (recognizing "fundamental liberty interest of natural parents in the care, custody, and management of their child").

In contrast, reasonable efforts determinations are "separate and distinct from [a] judge's certification regarding the child's best interests that decides whether the child should remain in the custody of the department." Walt, 478 Mass. at 228. A determination that the department has made reasonable efforts does not necessitate a child's removal from the home or maintenance in the department's care. Conversely, a determination that reasonable efforts were not made does not preclude removal or confirmation of the department's temporary custody, or even the ultimate termination of parental rights. See G. L. c. 119, § 29C ("A determination by the court that reasonable efforts were not made shall not preclude the court from making any appropriate order conducive to the child's best

interest"); Walt, supra ("regardless of whether the department made reasonable efforts to prevent or eliminate the need for removal from the home, no child should remain in the custody of the parents if his or her immediate removal is necessary to protect the child from serious abuse or neglect"); Adoption of Ilona, 459 Mass. 53, 61 (2011) (in deciding whether to terminate parental rights, "[a] judge may consider the department's failure to make reasonable efforts in deciding whether a parent's unfitness is merely temporary," but "even where the department has failed to [make reasonable efforts], a trial judge must still rule in the child's best interest")

To be sure, a parent or a child each have a considerable interest in receiving the services that constitute the department's reasonable efforts -- services "designed to improve the capacity of families to provide safe and stable homes for their children" (citation omitted). Rashida I, 488 Mass. at 219. Nevertheless, this interest is less weighty than a parent's fundamental interest in the care and custody of his or her child. It would therefore be incongruous to apply a higher standard of proof in reasonable efforts determinations than in the temporary custody determinations made in the context of a seventy-two hour hearing, as the former does not directly address custody rights, while the latter does.

In another respect, the private interest at stake in a seventy-two hour hearing and the private interest implicated in a reasonable efforts determination are similar, and hence the private interest component of the due process analysis in Robert is directly applicable here. We have recognized that "for purposes of due process analysis, a significant consideration is 'the permanency of the threatened loss.'" Robert, 408 Mass. at 60, quoting Santosky, 455 U.S. at 758. Thus, when we addressed the question of the standard of proof to be applied at the seventy-two hour hearing in Robert, we concluded that because any deprivation of custody rights threatened by that hearing would be a "reversible" and "temporary," proof by a preponderance of the evidence is sufficient to satisfy due process rather than the more demanding clear and convincing evidence standard required when parental custody is permanently terminated. Robert, supra at 60-61.

With reasonable efforts determinations, any failure to obtain remedial orders will likewise be temporary and reversible. After the reasonable efforts determination conducted at the emergency hearing, the next such determination must be done within seventy-two hours. After the determination made at the seventy-two hour hearing, the next determination must be made within a year. While the child remains in the care of the department, there will never be more than a year's span

between one reasonable efforts determination and the next. Moreover, a parent or child may move for a renewed reasonable efforts determination even before the annual review, provided he or she can meet the burden of production. Rashida I, 488 Mass. at 230.

The temporary and reversible nature of the deprivation threatened at a reasonable efforts determination, together with the fact that reasonable efforts determinations do not directly determine custody rights, points toward the sufficiency of a preponderance of the evidence standard for purposes of procedural due process.

Turning to the risk of erroneous deprivation component of the due process analysis, we again consider the Robert court's analysis relevant. In particular, the court recognized that where the same inquiry will be repeated at a number of successive hearings, the risk of erroneous deprivation at any given hearing is thereby diminished. This is so because any errors that arise in earlier hearings "can be discovered and corrected in subsequent proceedings." Robert, 408 Mass. at 64. As we have indicated earlier, by statute reasonable efforts determinations must occur at multiple points in a care and protection case. The court in Rashida I further provided for additional motions and determinations. Consequently, there are repeated opportunities for judicial review of the department's

provision of services to facilitate family reunification. This greatly diminishes the risk of erroneous deprivation at any given reasonable efforts determination.

We are also conscious of the practical realities that a reasonable efforts determination must be conducted at the emergency hearing and at the seventy-two hour hearing. See Rashida I, 488 Mass. at 219. These hearings must be held within a very short time period after the filing of a care and protection petition. Given the tight time frames and "abbreviated nature" of these hearings, it appears somewhat unrealistic to require that the department prove its reasonable efforts by the more demanding clear and convincing standard. See Robert, 408 Mass. at 67. Because we have determined that the same standard of proof should apply at every point where the Juvenile Court will determine the department's reasonable efforts, this constraint of practicality points toward the application of the less demanding preponderance of the evidence standard to all reasonable efforts determinations. Although we recognize that applying this less stringent standard of proof presents some risk of error, we are confident that the framework of ongoing judicial oversight of the department's reasonable efforts sufficiently mitigates any such risk. We therefore conclude that the fair preponderance of the evidence provides

sufficient protection against the risk of error in reasonable efforts determinations.

The Robert court's discussion of the final factor in the Eldridge test requires further analysis. The court's definition of the governmental interest in temporary removal proceedings is multifaceted. The court explained that "[t]he Commonwealth's interest . . . extends initially to the maintenance of a stable family environment and, if this is not present, to the provision of adequate care and protection for the child." Robert, 408 Mass. at 66. At least the part of the court's analysis relating to the governmental interest in a stable family environment is directly applicable to reasonable efforts determinations, which are designed to strengthen the family relationship.[2]

Also applicable is the Robert court's discussion of the fiscal and administrative burden, particularly the additional fiscal and administrative burden related to the Commonwealth

[2] The department's regulations declare that its policy is "to strengthen and encourage family life so that every family can care for and protect its children." See, e.g., 110 Code Mass. Regs. § 1.01 (2008). To that end, the department's avowed aim is to "make every reasonable effort to encourage and assist families to use all available resources to maintain the family unit intact." Id. This declaration reflects the care and protection statute's express statement of Massachusetts's policy, which is the "strengthening and encouragement of family life for the care and protection of children," particularly by "assist[ing] and encourag[ing]" the use by families of "all available resources" that may enable them to provide for the care and protection of their children. G. L. c. 119, § 1.

proving its case for continued temporary custody by clear and convincing evidence versus by a preponderance of the evidence. The court described that additional burden as limited and thus inconsequential. See id. We likewise deem this burden inconsequential to our analysis of the standard of proof of reasonable efforts here.

In Robert, however, the court also emphasized that "the adoption of a very rigorous standard of proof [at the temporary custody hearing] might put at serious risk the Commonwealth's and the child's interests in protecting children from abusive or neglectful parents." Id. As a reasonable efforts determination is separate, or at least separable, from decisions about custody, this consideration regarding the risk of abuse and neglect is only indirectly applicable. The State's interest and the parent's interests in reasonable efforts determinations are thus more closely aligned than they are in a proceeding directly affecting custody rights. The Commonwealth's separate, divergent interests are therefore less strong in reasonable efforts determinations than at the seventy-two hour hearing on temporary custody. This difference arguably cuts in favor of imposing a higher standard of proof on the department in a reasonable efforts determination. We conclude, however, that the over-all balancing of interests supports the same and not a higher standard of proof.

Although the State's separate and divergent interest is less strong in a reasonable efforts determination, as the child's removal from the home or maintenance in the department's care is not directly at issue, the same is true for the corresponding private interest: as we explained earlier, the stakes are less high for parents and the child as well, because custody is not directly at issue. We therefore do not think these corresponding and relatively counterbalancing differences make a different standard of proof appropriate for a reasonable efforts determination from that for temporary custody decisions.

Taking the three Eldridge factors together, we conclude that proof by a preponderance of the evidence is sufficient to satisfy procedural due process in reasonable efforts determinations. Particularly important to, and ultimately dispositive of, our over-all balancing of the Eldridge factors is the availability of multiple opportunities for judicial review of the reasonable efforts being made by the department.

Conclusion. As informed by our prior case law, particularly Robert, 408 Mass. 52, procedural due process requires that when a Juvenile Court judge determines whether the department has made reasonable efforts, on either a child's or a parent's motion or at the various points in the life of a care and protection case where reasonable efforts determinations are required by statute, the department must meet its burden by at

least a fair preponderance of the evidence. Applying a higher standard of proof in reasonable efforts determinations would be incongruent with our determination in Robert that, at a seventy-two hour hearing, proof of parental unfitness by a preponderance of the evidence is appropriate, as a matter of due process, to maintain a child's removal from the home and maintenance in the department's custody. We therefore declare that, at a reasonable efforts hearing, the department's burden is to prove that it has made reasonable efforts by a preponderance of the evidence.

So ordered.